

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Competitive Product Prices
Inbound Competitive Multi-Service Agreements with
Foreign Postal Operators
Deutsche Post – United States Postal Service
Bilateral Agreement (MC2010-34)
Negotiated Service Agreement

Docket No. CP2013-65

PUBLIC REPRESENTATIVE COMMENTS ON POSTAL SERVICE
NOTICE CONCERN ADDITIONAL INBOUND COMPETITIVE
MULTI-SERVICE AGREEMENTS WITH FOREIGN POSTAL OPERATORS 1
NEGOTIATED SERVICE AGREEMENT (DEUTSCHE POST)

(June 17, 2013)

The Public Representative hereby provides comments pursuant to Order No. 1740.¹ In that Order, the Commission established the above referenced docket to receive comments from interested persons, including the undersigned Public Representative, on the Postal Service's Notice of its entry into an additional bilateral agreement for inbound competitive services with Deutsche Post AG (Deutsche Post).² The Postal Service seeks to include the inbound portion of a bilateral agreement with Deutsche Post (Deutsche Post Agreement) within the Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 product. Notice at 1.

In Order No. 546, the Commission approved the addition of the Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 product to the competitive product list, and included within that product an agreement with Koninklijke

¹ PRC Order No. 1740, Notice and Order Concerning Additional Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 Negotiated Service Agreement (With Deutsche Post), June 7, 2013.

² United States Postal Service Notice of Filing Additional Functionally Equivalent Inbound Competitive Multi-Service Agreement with a Foreign Postal Operator (Deutsche Post), June 6, 2013, (Notice) at 1.

TNT Post BV and TNT Post Pakketservice Benelux BV (TNT Agreement).³ In Order No. 840, the Commission accepted the Postal Service's designation of the TNT Agreement as the baseline agreement for purposes of determining whether future agreements are functionally equivalent.⁴ The Commission subsequently added bilateral agreements with the China Post Group (China Post 2011 Agreement) and Posten Norge AS (Norway Post Agreement) to the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 product.⁵ The Commission also approved bilateral agreements with the Australian Postal Corporation (Australia Post Agreement), the Canada Post Corporation (Canada Post Agreement), and the Hongkong Post (Hongkong Post Agreement).⁶ More recently, the Commission determined that the bilateral agreement with Royal PostNL BV, a successor agreement to the TNT Agreement, should be included within the product.⁷

The Deutsche Post Agreement establishes prices and classifications not of general applicability for the delivery of inbound Air Parcel Post (Air CP), SAL Parcels, and Surface Parcel Post (Surface CP) in the United States.⁸ The Deutsche Post Agreement is intended to become effective July 1, 2013, and remain in effect until

³ PRC Order No. 546, Order Adding Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 to the Competitive Product List and Approving Included Agreement, Docket Nos. MC2010-34 and CP2010-95, September 29, 2010.

⁴ PRC Order No. 840, Order Concerning an Additional Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 Negotiated Service Agreement, Docket No. CP2011-69, September 7, 2011, at 5.

⁵ PRC Order No. 859, Order Concerning An Additional Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 Negotiated Service Agreement, Docket No. CP2011-68, September 16, 2011; PRC Order No. 840, *supra*.

⁶ PRC Order No. 956, Order Concerning An Additional Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 Negotiated Service Agreement, Docket No. CP2012-1, November 9, 2011; PRC Order No. 1088, Order Adding an Additional Bilateral Agreement to Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 Product, Docket No. CP2012-4, December 30, 2011. PRC Order No. 1580, Order Approving An Addition Inbound Competitive Multi-Service Agreement with Foreign Postal Operators Negotiated Service Agreement, Docket No. CP2013-22, December 17, 2012.

⁷ PRC Order No. 1593, Order Approving Addition of Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 Negotiated Service Agreement (with Royal PostNL BV), Docket No. CP2013-24, December 16, 2012.

⁸ The Postal Service states that "The competitive services offered to Deutsche Post include rates for inbound Air and Surface Parcels *and EMS*." (Emphasis added) Notice at 4. According to the Deutsche Post Agreement, Annex 1, rates are offered only for inbound Air Parcels, SAL Parcels and Surface Parcels. *Id.*, Attachment 1 at 10.

terminated by either party pursuant to Article 9: Termination. Notice at 4; *Id.*, Attachment 1, at 3.

COMMENTS

The Public Representative has reviewed the Deutsche Post Agreement and the supporting financial model filed under seal that accompanied the Postal Service's Notice. Based upon that review, the Public Representative concludes that the Deutsche Post Agreement is functionally equivalent to the baseline TNT Agreement. Compared to the TNT Agreement, however, there are important differences in several articles of the Deutsche Post Agreement, the operation of which raise questions about the Postal Service's intention to provide notice for future rate changes. Moreover, the negotiated inbound rates offered in the Deutsche Post Agreement are likely to generate sufficient revenue to cover its attributable costs.

Functional Equivalence. The Postal Service asserts that the "Deutsche Post Agreement is substantially similar to the inbound portion of the TNT Agreement in terms of the products being offered under the contract and the contract's cost characteristics." Notice at 5. However, the Postal Service identifies differences between the Deutsche Post Agreement and the baseline TNT Agreement, including: in Article 3: Oversight and Effective Date, a commitment to revise accounting business rules related to settlement; a new Article 8: Customs Inspection; in Article 10: Dispute Resolution, a new paragraph requiring mediation; in Article 21: Entire Agreement, a new paragraph to address the applicability of prior agreements; and, the addition of Article 23: Intellectual Property, Co-Branding and Licensing; Article 24: Survival; and, Article 26: Records. Other differences with the baseline TNT Agreement include: in Annex 1, revisions to the explanatory paragraphs preceding the rate tables, and to the specification of parcel product categories and formats, including the addition of EPG parcels; and a new Annex 2, concerning content restrictions, and Annex 3, identifying Office of Exchange Routing Details. *Id.*, at 5 – 7.

The most important differences compared to the baseline TNT Agreement concern Articles authorizing the renegotiation of rates and the term of the Deutsch Post

Agreement.⁹ During the term of the Deutsch Post Agreement, new Article 27, Average Weight, grants each party “the right to renegotiate any rate that appears in [Annex 1],” in the event the average weight per piece for either air or surface parcel post increase or decrease by at least 15 percent.¹⁰ Unlike the two-year term of the baseline TNT Agreement, however, the Deutsch Post Agreement does not establish a contract term with a date certain end. Revised Article 22: Term, states that the Deutsch Post Agreement will remain in effect “from the Effective Date until terminated pursuant to Article 9.” In this regard, revised Article 9: Termination, provides that either party may terminate the Agreement “without cause” upon 90 day advance written notice.

The Postal Service “does not consider that the specified differences affect either the fundamental service the Postal Service is offering or the fundamental structure of the agreements.” Notice at 8. The Public Representative agrees that these differences do not alter the conclusion that the Deutsche Post Agreement is functionally equivalent to the baseline TNT Agreement. Like the TNT Agreement, the Deutsche Post Agreement offers rates for inbound Air and Surface Parcel Post, and therefore exhibits similar cost or market characteristics.

Nevertheless, the Deutsch Post Agreement is designed to operate in perpetuity, absent either party invoking Article 9. In addition, Article 27 permits either the Postal Service or Deutsche Post AG during that time to negotiate new rates for air or surface parcel post if the average weight per piece for either increases or decreases by at least 15 percent. Assuming the Agreement is not terminated, It’s not clear whether the operation of these two Articles, in the Postal Service view, excuses it from filing a notice pursuant to 39 C.F.R. § 3015.5 in the event new rates are negotiated. At a minimum, the Commission should request from the Postal Service an explanation as to its plans to provide notice of such a rate change.

⁹ A noteworthy difference concerns the treatment of Extraterritorial Offices of Exchange (ETOE) under the Deutsche Post Agreement. In new Article 25, Group Clause with Right to Request, inbound items tendered by ETOEs, all companies in the Deutsche Post DHL Group, including all companies affiliated with Deutsche Post AG, are entitled “to call upon the contractual services of USPS on the conditions agreed in the Agreement.” No similar Article appears in the baseline TNT Agreement.

¹⁰ The Postal Service’s Notice, while carefully noting the changes in the Deutsch Post Agreement, was incomplete as it did not identify new Article 27 in the Deutsch Post Agreement as a difference from the baseline TNT Agreement. See Notice at 5 – 7.

Requirements of 39 U.S.C. § 3633. Pursuant to 39 U.S.C. § 3633(a), the Postal Service must demonstrate that the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 product covers attributable costs, which precludes the subsidization of competitive products by market dominant products and thereby makes an appropriate contribution to the institutional costs of the Postal Service. In this proceeding, the Postal Service's financial model does not demonstrate that the addition of the Deutsche Post Agreement results in the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 product covering costs as required by 39 U.S.C. § 3633. However, the Postal Service's financial model indicates that the negotiated rates in the Deutsche Post Agreement will generate sufficient revenues to cover its attributable costs, and therefore will not degrade the cost coverage of the product.

The Public Representative respectfully submits the foregoing comments for the Commission's consideration.

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